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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 420

CHARLES McDANIEL, et al.,
Petitioners,

vs.

JOSEPH BARRESI, JR., et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF PETITIONERS

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BRIEF OF PETITIONERS

Petitioners are the Superintendent of Education and members of the Board of Education of Clarke County, Georgia; and, with certain predecessors in office, were defendants in two actions filed in the Superior Court of Clarke County, Georgia, the Plaintiffs, who included the Respondents herein, seeking to have enjoined the use of an elementary school attendance plan adopted by Clarke County Board of Education; wherein injunctions were denied, but on appeal to the Supreme Court of Georgia the judgment of the Trial Court was reversed.

OPINIONS BELOW

Petitioners applied for Writ of Certiorari to review the opinion and judgment of the Supreme Court of Georgia in the case of **Joseph Barresi, Jr., et al. v. Browne, President of Clarke County Board of Education, et al.**, 226 Ga. 456, ... S. E. 2d ...; (A-228-234), which judgment reversed the judgment of the Superior Court of Clarke County, Georgia (A-32-36), which judgment is unreported.

JURISDICTION

Petitioners' application for Writ of Certiorari was filed July 20, 1970, seeking a review and reversal of an opinion and judgment rendered by the Supreme Court of Georgia on June 15, 1970 (A-228-234); jurisdiction of the Supreme Court of the United States being invoked under Title 28, U. S. Code, Section 1257 (3). The Supreme Court of Georgia is the highest Court of the State of Georgia in which a decision could be had; and the case involves the claimed rights and privileges of the parties under the Fourteenth Amendment of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States, Amendment XIV, Section I:

> "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Civil Rights Act of 1964 (Pub. Laws 88-352, Title IV, Section 401; 78 Stat. 246, 42 USCA (Chapter 21) Section 2000c) which provides in pertinent part:

"As used in this sub-chapter . . . (b) 'desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

3. The Civil Rights Act of 1964 (Pub. Laws 88-352, Title IV, Section 407; 78 Stat. 428, 42 USCA (Chapter 21) Section 2000c-6 (a) (2)) which provides in pertinent part:

". . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

QUESTIONS PRESENTED

1. Whether the Supreme Court of Georgia was correct in holding that a plan adopted by Clarke County Board of Education for attendance of students in the elementary schools of Clarke County School District constituted a violation of the constitutional rights, under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, of those students who were thereby required to attend schools more distant from their residences than other schools in the school district. The plan in question was adopted in July of 1969, and approved by the Civil Rights Division of the Department of Health, Education and Welfare on August 7, 1969, and established school attendance zones in such a manner as to accomplish substantial integration of white and black students in all such schools, with a ratio of 20% to 40% black and 80% to 60% white students in each school used

as a criterion; and which plan included five areas described as "pockets" or "satellite zones", from which areas students were assigned to schools more distant from their residences than other elementary schools of their grade level in the system; which plan involved the busing of students in some zones to schools more distant from their residences than other elementary schools in the system.

2. Whether the Supreme Court of Georgia was correct in holding that the provisions of the Civil Rights Act of 1964 (Pub. Laws 88-352, Title IV, Section 401 and 407, 78 Stat. 246 and 248, 42 USCA, Chapter 21) prohibited a board of education from adopting and operating a school attendance plan which involved the assignment of students to public schools in order to overcome racial imbalance, and the transportation of students from one school zone to another in order to achieve a racial balance.

STATEMENT OF FACTS

Beginning in 1963, Clarke County Board of Education began integration of its schools, first by means of transfer applications, and subsequently by use of "freedom of choice" and zoning, all without the compulsion of any court proceeding or order. In the 1968-69 school year it operated on a zone basis for outlying areas, and freedom of choice for schools in the central areas of the City of Athens. This was with approval of the Department of Health, Education and Welfare (HEW) (A-160).

In October 1968, HEW notified the Board of Education that a plan would be required for future years which would involve greater desegregation of students and faculty. A committee of three members of the Board, as well as faculty, administrative staff members, citizens groups, and the School Desegregation Education Center of the University of Georgia, studied various zoning, pairing and other plans; and the Board of Education finally, on

April 24, 1969, approved a "Neighborhood Plan" as being the best that could be devised, in view of the complicated racial distribution and housing patterns and transportation problems in Clarke County. This plan had the tentative approval of the Atlanta office of HEW, but after submitting it to the Washington, D. C., Civil Rights Division of HEW, and after considerable discussion and delay by that office, the plan was rejected by letter of June 30, 1969, primarily because the plan left some schools with a small minority of white students and would tend to result in resegregation (A-161-164).

After considering the possibility of submitting a different plan, the Board of Education, on July 16, 1969, voted to proceed with a hearing before a hearing director on the question of legality of the Neighborhood Plan previously submitted. However, on July 30, 1969, after several meetings, the Board adopted what was called a "Compromise Zoning Plan", which was submitted to and approved by the Washington office of HEW on August 7, 1969. This is the plan which is involved in this litigation (A-165).

This plan is basically a neighborhood zone plan, but involves four "Pockets" to be bussed from one zone to schools in another, and one "pocket" from which students were within one and one-half miles of two schools, and were assigned to the one of those two schools further from their home (A-174).

In order to have space in the schools to which students were sent from these pockets, it was necessary to adjust zone lines for those schools in such a manner that some students would be transported to schools other than those nearer their residences. The primary purpose of this plan was to achieve some degree of racial balance, and the members of the Board of Education, when asked by the committee appointed to devise a plan, what racial composition should be considered, suggested a criterion of 20% to 40% black in each school (A-182, 204).

Two actions were filed in Clarke Superior Court to enjoin the operation of this plan, the plaintiff's being groups of white parents of children residing in zones whereby they were transported to schools more distant from their residences than other schools; and also three black citizens who resided in the "Pocket" from which their children walked to a school in an adjoining zone, while there was another school nearer their residences. None of those persons in the four "Pockets" required to be transported by bus were parties to either of these actions. (A-48).

The petitions in these actions contended, among other things, that the plan violated the Fourteenth Amendment rights plaintiffs to equal protection of the laws, and violated the provisions of Title IV of the Civil Rights Act of 1964 (A-8 and 22).

These actions, together with a third action by plaintiffs against the Georgia State Board of Education (not material here), were consolidated for trial, and after hearing the Trial Judge denied the injunction sought by plaintiffs (A-32-36).

Some of the plaintiffs in those actions appealed to the Supreme Court of Georgia, which Court, on June 15, 1970, reversed the judgment of the Trial Judge, and ruled that the plan adopted by Clarke County Board of Education was unconstitutional in that it deprived plaintiffs-Appellants of equal protection of laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States; and that it was in violation of Title IV of the Civil Rights Act of 1964, in that it assigned students to particular schools solely on account of their race (A-228-234).

This plan, while designated at the time of its adoption as a plan for the 1969-70 school year, must continue as the basic plan for future years, with some modifications, and,

if desegregation is to continue, must still retain the "Pocket Bussing" and zoning in the manner declared unconstitutional by the Supreme Court of Georgia, unless that decision is upheld. Whether the decision of the Supreme Court of Georgia is correct or not is the question which the Supreme Court of the United States is asked to determine.

SUMMARY OF ARGUMENT

1. Boards of Education of public schools have the judicially declared "affirmative duty to take whatever action may be necessary to desegregate their schools so that they are no longer identifiable as white schools or Negro schools."

2. In the placement of students in schools a board of education is vested with a wide discretion.

3. Neither a child nor his or her parents has any constitutional right to choose which school the child shall attend; nor is assignment to a more distant or less convenient school than another school in the system a violation of the person's constitutional rights under the Fourteenth Amendment.

4. While the establishment of a unitary school system requires that students be assigned without regard to their race, it is necessary that race be taken into consideration in order to eliminate a formerly operated dual school system.

5. The Civil Rights Act of 1964 (Pub. Laws 88-352, Title IV, Section 401; 78 Stat. 246; 42 USCA, Section 2000c, and Title IV, Section 407, 78 Stat. 248, 42 USCA, Section 2000c 6(a)) does not prohibit voluntary action by a board of education which involves busing from one area to another in order to accomplish school desegregation.

ARGUMENT

1. Boards of Education of Public Schools Have the Judicially Declared Affirmative Duty to Take Whatever Action May Be Necessary to Desegregate Their Schools.

The opinion and judgment of the Supreme Court of Georgia (A-228-234), which the petitioners herein insist should be reversed and set aside, holds that the school attendance plan adopted by Clarke County Board of Education violates the rights of the Plaintiffs in the Trial Court, who are parents of children attending elementary schools in Clarke County, Georgia, under the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States. The opinion of the Supreme Court of Georgia states that ". . . in our view, the United States Supreme Court has not declared that compulsory integration of the races in public school systems is demanded." The opinion cites **Green v. School Board of New Kent County**, 391 U. S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716, as its authority for this conclusion.

We do not understand **Green** to authorize the conclusion reached by the Supreme Court of Georgia. In fact, **Green** very plainly states (pp. 437-8) that school boards under **Brown II** are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." **Green** further states (p. 439) that "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now." Also (p. 442), that "The Board must be required to . . . fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'negro' school, but just schools."

The issue in **Green** was whether or not a "freedom of choice" plan adopted by the school board of New Kent County, Virginia, was a sufficient compliance with law, and this Court held that it was not. To the same effect were the decisions of this Court in **Raney, et al. v. Board of Education**, 391 U. S. 443, 88 S. Ct. 1697, 20 L. Ed. 2d 727; and in **Monroe, et al. v. Board of Commissioners**, 391 U. S. 450, 88 S. Ct. 1700, 20 L. Ed. 2d 733. Monroe dealt with what was called a "free transfer" plan, and the Court held (p. 449) that ". . . if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable."

In **Alexander v. Holmes County Board of Education**, 396 U. S. 19, 90 S. Ct. 29, 24 L. Ed. 2d 19, this Court states that "Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."

If there is any doubt that this Court has declared that compulsory integration of the races in public school systems is demanded, the cases of **Green** and **Alexander**, as followed and applied in **Carter v. West Feliciana School Board**, 396 U. S. 290, 90 S. Ct. 608, 24 L. Ed. 2d 477, and **Northcross v. Board of Education of Memphis**, 397 U. S. 232, 90 S. Ct. 891, 25 L. Ed. 2d 246, should make it abundantly clear that boards of education are required to not merely refrain from assigning students to racially segregated schools, but to institute assignment policies whereby all schools will contain substantially integrated students and faculty.

The Courts of Appeals, and particularly of the Fifth Circuit, have very clearly held that determination of school zones which result in continuing segregation because some schools remain substantially white while others re-

main substantially all black do not meet the constitutional requirements, and school boards have been required to alter zone lines or adopt other attendance plans whereby mixing of the races in all schools will be accomplished. **Davis v. Board of Commissioners of Mobile County, et al.**, 393 F. 2d 690 (5th Cir.); **United States v. Indianola Municipal Separate School District**, 410 F. 2d 626 (5th Cir.); **Henry v. Clarksdale Municipal Separate School District, et al.**, 409 F. 2d 682 (5th Cir.).

2. **In the Placement of Students in Schools a Board of Education Is Vested With a Wide Discretion.**

"A school board may exercise discretionary power to assign pupils to the several schools within its jurisdiction, and, where orders and rules made pertaining thereto are reasonable, necessary, and such as will best afford all eligible an opportunity to receive the benefits of proper instruction, they will be sustained by the courts." 79 C. J. S. 368, Section 450.

Respondents' children were not assigned to a particular school on account of their race, but because they resided in an area zoned for that school. Regardless of the race of the individual, all students in the area were assigned to the designated school, but, of necessity, racial composition of the area was a prime consideration.

But, even if it be assumed that the Supreme Court of Georgia was correct in its conclusion that the children of Respondents were excluded from attending a particular school on account of their race, this would still not constitute a violation of their rights under the Fourteenth Amendment under the circumstances and conditions existing. In the exercise of its discretion, and in order to accomplish required desegregation of its schools, Clarke County Board of Education had to make adjustments and relocations of students.

In **Olson v. Board of Education of U. Free School District No. 12**, 250 F. Sup. 1000, on page 1010, the Court stated: "While classifications based on race alone are 'constitutionally suspect' under the Equal Protection Clause, such a classification is not proscribed if it is necessary to the accomplishment of a permissible State policy. The Commissioner has determined that classification is necessary to effectuate the State's policy of equal educational opportunities and he has the support of expert opinion and the New York Court of Appeals. Under the circumstances this Court is not justified in interfering with that conclusion."

The Supreme Court of Georgia has consistently recognized, at least prior to the opinion herein concerned, that boards of education have a wide discretion in the matter of assigning students to schools within their district. **Keever v. Board of Education of Gwinnett County**, 188 Ga. 299 (3 S. E. 2d 886); **Beddingfield v. Parkerson**, 212 Ga. 654 (94 S. E. 2d 714); **McKenzie v. Walter**, 210 Ga. 189 (2) (78 S. E. 2d 486).

3. **A Person Does Not Have Any Constitutional Right to Choose Which School a Child Shall Attend; Nor Is Assignment to a More Distant or Less Convenient School Than Another in the System a Violation of Constitutional Rights Under the Fourteenth Amendment.**

Clarke County Board of Education has consistently tried to meet its obligations with regard to desegregation in such a manner as to avoid being subjected to Court orders on the one hand and local disorders on the other (A-160-176). In April of 1969, after much consideration of various plans, it adopted and submitted to the Department of Health, Education and Welfare what was called the "Neighborhood Plan" (A-167-168). While this plan had its faults in that it left four of the thirteen elementary

schools substantially all white and two predominantly black, no rearrangement of zone lines could be found to alleviate these conditions, without overcrowding some schools and leaving vacant spaces in others.

When that plan was rejected by HEW on June 30, 1969, the Board could find no workable alternative except the establishment of "Pockets" or "Satellite Zones" from which students would be transported to schools in other areas of the county. Since school facilities in such other areas were filled to capacity, it was necessary to adjust zone lines to relieve overcrowding and make room for those brought in (A-174-6). The Respondents, who are some of the Plaintiffs in the Trial Court, and the Appellants in the Supreme Court of Georgia, are parents of white students who consider themselves displaced by such adjustment of zone lines, and three parents of black students residing in the "pocket" from which students attend a formerly all white school although they reside somewhat nearer a formerly all black school. None of the Respondents or other Plaintiffs in the Trial Court are parents of students being bused from any of the "pockets" or "Satellite Zones" (A-48).

The opinion of the Supreme Court of Georgia holds that "The evidence here shows that Appellants' children are 'effectively excluded' from attending a school because of their race"; and that "This neither squares with the Fourteenth Amendment nor its interpretation by the United States Supreme Court holding that 'racial discrimination' is unconstitutional."

That ruling can only be upheld if it is found that a student has a constitutional right to attend a particular school or the school nearest his residence. We submit that no such right exists.

In **United States v. Jefferson County Board of Education**, 372 F. 2d 836, **aff'd en banc.** 380 F. 2d 285, cert. de-

nied sub nom., **Caddo Parish School Board v. United States**, 389 U. S. 840, 88 S. Ct. 67, 19 L. Ed. 2d 103, the Court of Appeals of the Fifth Circuit stated that "A school child has no inalienable right to choose his school" (380 F. 2d at page 390). This was followed in **Davis v. Board of School Commissioners of Mobile County, et al.**, 393 F. 2d 690 (Note 5 on page 693), the Court adding there that "The school board on the other hand, has a constitutional duty to desegregate its system." In **Griffin v. School Board of Prince Edward County**, 377 U. S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256, this Court held that "The Equal Protection Clause of the Fourteenth Amendment relates to equality between persons in a state, not between areas." And that "Showing that different persons are treated differently is not enough, without more, to show a denial of equal protection; it is the circumstances of each case which govern."

In **Kotch v. River Port Pilot Commissioner**, 330 U. S. 552, 67 S. Ct. 910, 91 L. Ed. 1093, the Court stated (page 556) that "A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment (cit.). Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be."

In **Acree v. County Board of Education of Richmond County, Georgia**, 294 F. Supp. 1034 (S. D. Ga.), the court recognized the principle that no student has a constitutional right to attend a school of his own choice. The body of the opinion cites as authority for this statement the case of **United States v. Jefferson County Board of Education**, 372 F. 2d 236 (supra).

When it became necessary, in order for Clarke County Board of Education to comply with the mandates of this Court, in light of numerous decisions of Courts of Appeals

which made it obvious that thorough mixing of the races is required, and not merely permitting a few members of one race to attend schools where the other race was predominant, or drawing zone lines so that a small number of one race would attend schools predominantly occupied by the other, Clarke County Board of Education found itself confronted with a racial distribution problem in the county which defied solution. The Board adopted a "Neighborhood Plan" (A-167-170), which, although zone lines were considerably distorted in order to afford more mixing of the races, still left two schools with more than 95% white and less than 5% black, two schools with more than 90% white and less than 10% black, one school with more than 80% black and less than 20% white, and one school with more than 60% black and less than 40% white (A-167).

While this plan involved no racial discrimination, it was by no means without faults. That plan was rejected by HEW primarily because it was felt that shifting of persons who considered themselves adversely affected would result in resegregation (A-223-226).

The only course left for the Board to follow required some form of extensive busing of students of one race into schools predominantly occupied by the other. Since the latter schools were filled to capacity, adjustments in zone lines had to be, and were, made. The Respondents herein are some of those who were affected by the zone changes, and who, the Supreme Court of Georgia says, have been denied equal protection of the laws in violation of their rights under the Fourteenth Amendment.

4. While the Establishment of a Unitary School System Requires That Students Be Assigned Without Regard to Their Race, It Is Necessary That Race Be Taken Into Consideration in Order to Eliminate a Formerly Operated Dual School System.

In the opinion of the Supreme Court of Georgia it is stated that "The Clarke County Board of Education has attempted to achieve a predetermined racial balance in its elementary schools by treating students differently because of their race." It is true that when a committee, appointed to make adjustments in the elementary school attendance plan, requested some guide line as to racial composition, the Board authorized a criterion of 20-40% black in each school (A. 181-2, 204).

In order for a board of education to comply with the requirements of this Court in **Brown II**, "to effectuate a transition to a racially nondiscriminatory school system", and the requirement in **Green** charging school boards "with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch", the consideration of the racial composition of the school population is absolutely necessary.

In **Wanner v. County School Board of Arlington County, Virginia**, 357 F. 2d 452 (4th Cir.) it is stated (page 454) that "When school authorities, recognizing the historic fact that existing conditions are based on a design to segregate the races, act to undo these illegal conditions—especially conditions that have been judicially condemned—their effort is not to be frustrated on the ground that race is not a permissible consideration. This is not the 'consideration of race' which the Constitution discountenances."

In **United States v. Jefferson County Board of Education**, 373 F. 2d 836 (5th Cir.), on page 876, the Court states: "The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose." On page 877 it is stated that "School officials have to know the racial composition of their school populations and the racial distribution within the school district. The courts and HEW cannot measure good faith or progress without taking race into account."

5. **The Civil Rights Act of 1964 Does Not Prohibit Voluntary Action by a Board of Education Which Involves the Moving, by Bus or Otherwise, of Students From One Area to Another in Order to Accomplish School Desegregation.**

The opinion of the Supreme Court of Georgia, in subdivision 2 thereof (A-232) holds that the plan adopted by Clarke County Board of Education was invalid as being in violation of the Civil Rights Act of 1964 (Pub. L. 88-352, Title IV, Section 401; 78 Stat. 246, 42 USCA Chapter 21) (42 USCA, Section 2000c and Section 2000c, 6-a).

In **United States v. Jefferson County Board of Education**, *supra*, 372 F. 2d at 878, the Court of Appeals of the Fifth Circuit clearly held that these provisions of the statute did not make such assignments unlawful. That decision has been followed in several other cases including **United States v. School District 151 of Cook**

County, Illinois (N. D. Ill.), 286 F. Supp. 786, 799; **Keyes v. School District No. 1, Denver, Colorado** (D. Col.), 303 F. Supp. 298; **Spangler v. Pasadena City Board of Education** (C. D. Cal.), 311 F. Supp. 501 (20).

The irrelevancy of such provisions of the Civil Rights Act to the plan adopted by Clarke County Board of Education is probably best stated in **Olson v. Board of Education** (E. D., New York), 250 F. Supp. 1000, on page 1006, as follows: "Plaintiff's assertion that Section 401 (b) of the Civil Rights Act of 1964, 42 U. S. C. A. Section 2000c (b), constitutes a prohibition against any plan to correct racial imbalance is without merit. The definition of the word 'desegregation' in that section relates to the administration of the government aid program in the desegregation of public schools. It has no relevance to the legality or the constitutionality of such a plan."

CONCLUSION

The Board of Education of Clarke County, Georgia, had a duty to take affirmative action to desegregate its schools. Performance of that duty required the transferring of students from formerly segregated schools in such a manner as to mix the races in all schools. In view of limited facilities, the moving of students into a school necessitated the moving of others out by changing of zone lines or otherwise. While the exercise of the Board's discretion in making necessary changes displeased some people, it did not violate their Constitutional rights.

The Equal Protection Clause of the Fourteenth Amendment does not entitle persons to choose which school their child will attend, nor does it prohibit boards of education from arranging attendance zones, transportation routes, and use of buildings and equipment, in such a manner as to best serve the needs of the whole community.

Title IV, Sections 401 and 407 of the Civil Rights Act of 1964 do not restrict boards of education in the exercise of their discretion relative to assignment of students to schools within their school systems.

The judgment of the Supreme Court of Georgia is erroneous, and should be reversed and set aside.

Respectfully submitted,

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